

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

N.R., a minor, by and through B.R., his  
Guardian Ad Litem,

No. C 06-1987 MHP

Plaintiff,

v.

SAN RAMON VALLEY UNIFIED SCHOOL  
DISTRICT,

**MEMORANDUM & ORDER**  
**Re: Cross-Motions for Summary  
Judgment**

Defendants.

\_\_\_\_\_/

Plaintiff N.R. (“plaintiff”), by and through his guardian ad litem, B.R., brings this action against the San Ramon Valley Unified School District (“the District”) pursuant to the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. sections 1400 et seq., seeking attorneys’ fees and reversal of a state Office of Administrative Hearings (“OAH”) decision. Specifically, plaintiff contests the determination of the Administrative Law Judge (“ALJ”) that the District offered free appropriate public education (“FAPE”) to plaintiff during the 2004–2005 regular school year, the 2005 extended school year (“ESY”), and the 2005–2006 regular school year. Now before this court are the parties’ cross-motions for summary judgment. After having considered the parties’ arguments and submissions, and for the reasons set forth below, the court rules as follows.

## 1 BACKGROUND

### 2 I. Statutory Background

3 Congress enacted the IDEA “to ensure that all children with disabilities have available to  
4 them a free appropriate public education that emphasizes special education and related services  
5 designed to meet their unique needs and prepare them for further education, employment, and  
6 independent living.” 20 U.S.C. § 1400(d)(1)(A). A state satisfies the requirement of providing  
7 FAPE “by providing personalized instruction with sufficient support services to permit the child to  
8 benefit educationally from that instruction.” Board of Educ. of Hendrick Hudson Cent. Sch. Dist.,  
9 Westchester County v. Rowley, 458 U.S. 176, 203 (1982) (hereinafter “Rowley”). The education  
10 required by the IDEA is tailored to the student’s unique needs by the development of an  
11 “individualized educational program” (“IEP”), which is prepared at a meeting convened for that  
12 purpose. Rowley, 458 U.S. at 181.

13 In addition to its substantive requirements, the IDEA provides procedural safeguards,  
14 violations of which may constitute denial of FAPE. Amanda J. ex rel. Annette J. v. Clark County  
15 Sch. Dist., 267 F.3d 877, 892 (9th Cir. 2001). Among the most important of procedural safeguards  
16 are those that protect parents’ rights to be involved in the development of their child’s IEP. Id. at  
17 882. Procedural violations that “result in the loss of educational opportunity,” “seriously infringe  
18 the parents’ opportunity to participate in the IEP formulation process,” or “caus[e] a deprivation of  
19 educational benefits . . . clearly result in the denial of FAPE.” Id. (internal quotations omitted).  
20 Under the IDEA, these three inadequacies are the only procedural violations that can support a  
21 Hearing Officer’s finding of a denial of FAPE. 20 U.S.C. § 1415(f)(3)(E)(ii). California has  
22 implemented the mandated procedural safeguards in California Education Code sections 56500  
23 through 56507.

24 Given the substantive and procedural requirements of the IDEA, a reviewing district court  
25 conducts a two-step inquiry: “First, has the State complied with the procedures set forth in the Act?  
26 And second, is the individualized educational program developed through the Act’s procedures  
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1 reasonably calculated to enable the child to receive educational benefits?” Rowley, 458 U.S. at  
2 206–207 .

3  
4 II. Facts<sup>1</sup>

5 At all relevant times, plaintiff was a ten-year-old student diagnosed with autism, severe  
6 mental retardation and mild cerebral palsy. Plaintiff’s conditions have rendered him non-verbal and  
7 subject to severe behavioral deficits, and plaintiff requires several powerful medications to address  
8 his behaviors and reactions to his environment. Plaintiff is eligible for special education and related  
9 services, and his special needs consist of: development of social skills and independent living skills,  
10 augmentive and alternative communication services (“AAC”), functional academics, speech and  
11 language, occupational therapy, and behavioral services. Plaintiff has received special education  
12 services through the District since age five.

13 In June 2003, plaintiff filed a complaint against the District alleging that the District failed to  
14 provide appropriate behavioral support services, and that plaintiff was entitled to receive  
15 compensatory education. Plaintiff and the District resolved the dispute via a settlement agreement  
16 executed in August 2003 (“the settlement agreement”). At the time, plaintiff’s behavior services  
17 provider was Synergistic Interventions (“SI”). The settlement agreement set forth plaintiff’s  
18 program for the regular 2003–2004 school year, and provided that an IEP meeting would be held no  
19 later than December 15, 2003. The agreement also provided that a “transition team meeting” would  
20 be held prior to the December 2003 IEP meeting. The transition team meeting would be held to  
21 develop a “criteria-based transition plan” to transition from SI to a “qualified District staff or  
22 another qualified NPA [non-public agency] and, ultimately, to transition [N.R.] out of the home  
23 program.” The agreement specified that plaintiff’s teachers, service providers, and home program  
24 provider (SI) would attend the transition plan team meeting. Finally, the agreement stipulated that  
25 any proposed transition from SI to qualified District staff or another qualified NPA must first be  
26 approved by the IEP team.

1 On September 24, 2004, the District convened an IEP meeting in order to discuss the  
2 District's proposal to transition behavior supervisor services at home and school from SI to  
3 Psychology, Learning and You ("PLAY"), an NPA, and to transition 1:1 behavior support services  
4 from SI to District staff. A transition plan was developed at the meeting and sent to plaintiff's  
5 parents for their consent. The District sent letters seeking approval on October 20, 2004 and  
6 October 26, 2004.

7 Another IEP meeting was held on November 10, 2004, with plaintiff's parents and SI  
8 representatives in attendance. At this meeting, plaintiff's parents and the District agreed upon  
9 another IEP, providing for services from November 10, 2004 through at least March 24, 2005<sup>2</sup> ("the  
10 November IEP"). This was the last agreed-upon IEP between the parties.

11 Plaintiff continued to receive behavioral services through SI until February 2005. On  
12 February 21, 2005, SI notified plaintiff's parents that SI would stop providing services to plaintiff  
13 immediately due to an ongoing billing dispute with the District. Plaintiff's parents alerted the  
14 District to this fact, and the following day removed plaintiff from his District classroom placement  
15 and placed him privately. Plaintiff remained at the private placement at least until Fall 2005. That  
16 same day, the District sent a letter to plaintiff's parents offering District employee Patricia Onizuka  
17 as a 1:1 paraeducator and PLAY as a behavioral support provider.

18 On April 5, 2005, plaintiff's annual IEP meeting took place. At this meeting, plaintiff's  
19 parents introduced a representative from Stepping Stones, an NPA and behavior support services  
20 provider. The Stepping Stones representative had assessed plaintiff's behavioral needs and at that  
21 time was providing a home-based program to plaintiff at plaintiff's parents' expense. Plaintiff's  
22 parents requested that the District contract with Stepping Stones to provide behavioral services to  
23 plaintiff, and the District refused. An IEP was developed on this date, but plaintiff's parents did not  
24 agree to its terms. The IEP team agreed to reconvene on April 21, 2005 to continue the IEP.

25 On April 13, 2005, the District sent a written notice (entitled "Prior Written  
26 Notice/Placement Offer") to plaintiff's parents advising them of its denial of their request to contract  
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1 with Stepping Stones. The notice stated that the District already had a qualified NPA, PLAY, to  
2 provide support services for plaintiff at home and school.

3 The District worked with plaintiff's parents to reschedule the IEP meeting, ultimately  
4 agreeing on May 24. The IEP team met again on May 24, 2005 and a revised IEP was developed.  
5 Again, plaintiff's parents declined to agree to the terms of the IEP. The team met again on June 14,  
6 2005 and developed another IEP. The June 14 meeting occurred during the final week of the  
7 2004–2005 school year. Plaintiff's academic goals were agreed upon at the June 14 meeting, though  
8 plaintiff's parents and the District still disagreed regarding the appropriate NPA and plaintiff's  
9 parents therefore did not agree to the IEP. Plaintiff's parents once again requested that the District  
10 contract with Stepping Stones. On June 16, 2005, the District sent plaintiff's parents a second notice  
11 (entitled "Prior Written Notice") which refused the request and stated that PLAY and the District  
12 staff were qualified to provide services.

13 Plaintiff's goals as set forth in the June 14 IEP were revised on June 20, 2005 by Angela  
14 Connor, the District's behavior analyst.<sup>3</sup> On June 24, the District sent plaintiff's parents a letter  
15 advising them that the 2005 ESY was beginning on June 28, and providing them a "description of  
16 the District's complete proposed offer for Summer 2005 and the 2005–06 school year."<sup>4</sup> The letter  
17 enclosed a copy of the revised goals and objectives prepared by Connor.

18 In the meantime, plaintiff had filed a separate action alleging breach of the settlement  
19 agreement. On June 27, 2005, pursuant to a court-imposed mediation in that matter, the District's  
20 attorney sent plaintiff's attorney a proposed settlement agreement which included proposed  
21 programs for plaintiffs for the 2005 ESY and the 2005–2006 regular school year. Plaintiff did not  
22 accept the District's proffered classroom program, home program, or behavioral goals and services  
23 for either the 2005 ESY or the 2005–2006 regular school year.

24  
25 **III. Procedural History**

26 On July 25, 2005 the District filed a due process action seeking to establish that it had  
27 offered and provided FAPE for the 2004–2005 regular school year, and that it had offered FAPE for  
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1 the 2005 ESY and the 2005–2006 regular school year. The matter was heard by the California  
2 OAH. The parties stipulated for the purposes of the due process action and this appeal that AAC  
3 goals and services were not at issue for any of the three school periods in question, and that  
4 occupational therapy goals and services, and speech and language goals and services, were at issue  
5 from March 25, 2005 through the end of the 2004–2005 regular school year only.

6 Trial was conducted in the due process action before an ALJ from September 27 to October  
7 7, 2005. On December 15, 2005 the ALJ issued a decision finding for the District in all respects.  
8 Specifically, the ALJ found that the District’s offers for the three academic periods constituted  
9 FAPE.

10 On March 15, 2006 plaintiff filed a complaint against the District in this court, seeking  
11 review of the ALJ’s decision pursuant to 20 U.S.C. section 1415(i). Specifically, plaintiff argues  
12 that the ALJ’s findings that the District offered FAPE to plaintiff during the 2004–2005 regular  
13 school year, the 2005 ESY, and the 2005–2006 regular school year are not supported by evidence  
14 and are incorrect as a matter of law. Plaintiff further contends that the ALJ failed to make careful,  
15 thorough and impartial findings, failed to make required factual findings, made findings of fact that  
16 were clearly erroneous, and failed to conduct the proper legal analysis. Plaintiff seeks a finding that  
17 the District failed to offer FAPE to plaintiff during the three academic terms at issue, and a finding  
18 that plaintiff was the prevailing party in the administrative hearing and therefore entitled to attorney  
19 fees and costs. The administrative record has been lodged with this court, and the parties have  
20 stipulated that the court decide this matter based solely on the record without considering additional  
21 evidence.

## 22 23 LEGAL STANDARDS

### 24 I. Summary Judgment

25 Summary judgment is proper when the pleadings, discovery and affidavits show that there is  
26 “no genuine issue as to any material fact and that the moving party is entitled to judgment as a  
27 matter of law.” Fed. R. Civ. P. 56(c). Material facts are those which may affect the outcome of the  
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1 case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute as to a material fact is  
 2 genuine if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving  
 3 party. Id. The party moving for summary judgment bears the burden of identifying those portions  
 4 of the pleadings, discovery and affidavits that demonstrate the absence of a genuine issue of material  
 5 fact. Celotex Corp. v. Cattrett, 477 U.S. 317, 323 (1986). On an issue for which the opposing party  
 6 will have the burden of proof at trial, the moving party need only point out “that there is an absence  
 7 of evidence to support the nonmoving party’s case.” Id. at 325.

8 Once the moving party meets its initial burden, the nonmoving party must go beyond the  
 9 pleadings and, by its own affidavits or discovery, “set forth specific facts showing that there is a  
 10 genuine issue for trial.” Fed. R. Civ. P. 56(e). Mere allegations or denials do not defeat a moving  
 11 party’s allegations. Id.; see also Gasaway v. Northwestern Mut. Life Ins. Co., 26 F.3d 957, 959–60  
 12 (9th Cir. 1994). Nor is it sufficient for the opposing party simply to raise issues as to the credibility  
 13 of the moving party’s evidence. National Union Fire Ins. Co. v. Argonaut Ins. Co., 701 F.2d 95, 97  
 14 (9th Cir. 1983). If the nonmoving party fails to show that there is a genuine issue for trial, “the  
 15 moving party is ‘entitled to judgment as a matter of law.’” Celotex Corp., 477 U.S. at 323 (quoting  
 16 Fed. R. Civ. P. 56(c).

## 17 18 II. Judicial Review of IDEA Claims

19 The IDEA provides that a party aggrieved by the findings and decision made in a state  
 20 administrative due process hearing has the right to bring an original civil action in a state court of  
 21 competent jurisdiction or in federal district court in order to secure review of the disputed findings  
 22 and decision. See 20 U.S.C. § 1415(i)(2). The party challenging the decision bears the burden of  
 23 persuasion on its claim. Clyde K. v. Puyallup Sch. Dist., No. 3, 35 F.3d 1396, 1399 (9th Cir. 1994),  
 24 superseded by statute on other grounds. The statute provides that the court “(i) shall receive the  
 25 records of the administrative proceedings; (ii) shall hear additional evidence at the request of a  
 26 party; and (iii) basing its decision on the preponderance of the evidence, shall grant such relief as the  
 27 court determines is appropriate.” 20 U.S.C. § 1415(i)(2)(c). “Equitable considerations are relevant  
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1 in fashioning relief” under the IDEA. School Comm. of Burlington, Mass. v. Dep’t of Educ., 471  
 2 U.S. 359, 374 (1985). By nature, equitable relief is a fact-specific inquiry in which the Ninth Circuit  
 3 has held that “[t]he conduct of both parties must be reviewed to determine whether relief is  
 4 appropriate.” Parents of Student W. v. Puyallup Sch. Dist., No. 3, 31 F.3d 1489, 1496 (9th Cir.  
 5 1994) (internal citations omitted).

6 Judicial review of state administrative proceedings under the IDEA is less deferential than  
 7 the review of other agency actions. Ojai Unified Sch. Dist. v. Jackson, 4 F.3d 1467, 1471 (9th Cir.  
 8 1993). However, “[b]ecause Congress intended states to have the primary responsibility for  
 9 formulating each individual child’s education, [courts] must defer to their ‘specialized knowledge  
 10 and experience’ by giving ‘due weight’ to the decisions of the states’ administrative bodies.”  
 11 Amanda J., 267 F.3d at 888 (quoting Rowley, 458 U.S. at 206–08). This review requires the district  
 12 court to carefully consider the administrative agency’s findings. Susan N. v. Wilson Sch. Dist., 70  
 13 F.3d 751, 758 (3rd Cir. 1995). “The amount of deference accorded the hearing officer’s findings  
 14 increases where they are thorough and careful.” Capistrano Unified Sch. Dist. v. Wartenberg by and  
 15 through Wartenberg, 59 F.3d 884, 891 (9th Cir. 1995) (internal quotations omitted). After such  
 16 consideration, “the court is free to accept or reject the findings in part or in whole.” Susan N., 70  
 17 F.3d at 758. When the court has before it all the evidence regarding the disputed issues, it may make  
 18 a final judgment in what “is not a true summary judgment procedure,” but “a bench trial based on a  
 19 stipulated record.” Ojai, 4 F.3d at 1472.

## 20 21 DISCUSSION

### 22 I. Plaintiff’s Specific Challenges to the ALJ’s Findings

23 Plaintiff argues that the ALJ’s findings contain numerous errors and therefore the OAH  
 24 decision is not entitled to deference. Plaintiff cites these errors for the purpose of establishing the  
 25 appropriate level of deference for this court to afford the ALJ’s decision. However, because many  
 26 of plaintiff’s specific objections relate to the core substantive issues of the case, the court will  
 27 engage in a thorough analysis of each of the plaintiff’s objections.  
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1           A.     Factual Challenges

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3                   1.     Determination Regarding the June IEP Offer

4           Plaintiff objects to the ALJ's finding that "the IEP document contained the offer for ESY  
5 2005 and for the 2005–2006 school year," and that the IEP team "had spent a great deal of time  
6 developing and discussing the IEP for those time periods." OAH Decision at 4 ¶ 14 (hereinafter  
7 "Decision"). Plaintiff objects to this on the grounds that the ALJ "failed to make any attempt to  
8 recite what elements or program components he considered to comprise either of the offers," and  
9 that this finding is contradicted by the record. It is unclear why plaintiff objects to this seemingly  
10 uncontroversial finding. It appears undisputed that the District made an IEP offer on June 14, 2005,  
11 and that the IEP team had met several times since April 5 to develop the IEP. The sufficiency of the  
12 offer is in dispute, but the specific finding of fact challenged by plaintiff asserts only that the offer  
13 was made, not that it constituted FAPE.

14  
15                   2.     Determinations Regarding Qualifications of Service Providers

16           Next, plaintiff challenges the ALJ's findings that the District employees and PLAY  
17 personnel were "well-qualified" to provide services. Plaintiff disputes the findings regarding district  
18 employees Elaine Marchetti, Linda Wilock, and Patricia Onizuka, and PLAY owner Cheryl  
19 Markowitz. Plaintiff alleges that, in reaching its conclusion that these individuals were well-  
20 qualified, the ALJ gave no apparent weight to the abilities or testimony of Liz Isono, plaintiff's  
21 occupational therapy services provider who testified at the hearing. Plaintiff further claims that the  
22 ALJ discounted plaintiff's mother's testimony regarding Marchetti and Onizuka. Plaintiff also  
23 objects to the ALJ's reliance on what plaintiff characterizes as hearsay evidence regarding  
24 individuals who did not testify at the due process hearing.

25           As to Marchetti, the ALJ based its determination on Marchetti's Master's Degree in Speech  
26 Pathology and Audiology, her prior work experience in the area of speech and language services in  
27 private and public settings, her prior experience working with severely handicapped children, and  
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1 the fact that her references were checked prior to employment. Decision at 6 ¶ 26. The ALJ  
2 addressed plaintiff's mother's testimony in a footnote, noting plaintiff's mother's observations and  
3 objections to Marchetti. Plaintiff's mother observed Marchetti interacting with plaintiff at her home  
4 and "things did not go well." Id. at 6 n.5. Plaintiff's mother asserted that Marchetti appeared  
5 "uncomfortable and unfamiliar with [plaintiff] and his IEP, that she used the AAC device  
6 inappropriately, and asked [plaintiff] to say "elephant" even though [plaintiff] is non-verbal." Id.  
7 The ALJ concluded that plaintiff's mother's "account of the one-time observation does not change  
8 the finding that Ms. Marchetti was qualified and capable of providing S/L services to [plaintiff]." Id.  
9 Plaintiff directs the court to no further testimony regarding Marchetti. Although the analysis of  
10 plaintiff's mother's testimony was relegated to a footnote rather than the main text, the ALJ set forth  
11 plaintiff's mothers objections to Marchetti and explicitly found that plaintiff's mother's one-time  
12 observations did not outweigh the evidence supporting Marchetti's qualifications. The ALJ's  
13 analysis in this regard was suitably thorough and therefore entitled to deference.

14 Regarding Linda Wilock, who took over for Marchetti in March 2005, the ALJ again  
15 weighed the factors for and against a finding that Wilock was well-qualified to provide services to  
16 plaintiff. The ALJ found that, although Wilock "never met [plaintiff] since he was not in school  
17 when she was hired, . . . she had reviewed his files that contained his goals and objectives, as well as  
18 daily notes written by Ms. Marchetti . . ." Id. at 7 ¶ 27. The remaining information provided by the  
19 ALJ regarding Wilock focuses on her participation in the development of goals and objectives, her  
20 attendance at the IEP meetings on April 5 and May 24, and her presentation of progress reports and  
21 goals regarding plaintiff. Id. at 7 ¶¶ 27–28. The ALJ further noted that Wilock consulted with  
22 plaintiff's AAC provider and presented the revised goals at the June IEP meeting, that the IEP team  
23 did not dispute the goals, and that plaintiff's parents did not express any objection at the June IEP  
24 meeting. Id. at 7 ¶ 29. Although the ALJ's factual support for Wilock's qualification is less  
25 extensive, plaintiff points to nothing in the record to contradict the ALJ's conclusion. It may have  
26 been better if Wilock had met with plaintiff before she was hired. However, given the fact that she  
27 took significant steps to familiarize herself with plaintiff's needs, the fact that plaintiff's parents had  
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1 removed plaintiff from the District placement and placed him privately, and the fact that plaintiff's  
2 parents did not object to Wilock at the IEP meeting, Wilock's failure to meet with plaintiff is not  
3 sufficient to negate or otherwise adversely affect the ALJ's findings.

4       Regarding Markowitz, the owner of PLAY, the ALJ stated that Markowitz "has an  
5 impressive educational background, extensive work experience, and is well qualified to assume the  
6 role of providing behavioral support and services to [plaintiff]." Id. at 8 ¶ 33. The ALJ further  
7 noted that Markowitz "had worked with students with needs similar to [plaintiff's] and could  
8 implement goals appropriate to providing educational benefit to [plaintiff] and his unique needs."  
9 Id. Again, plaintiffs point to nothing in the record to contradict this finding. Although plaintiff  
10 asserts that the ALJ "gave no apparent weight to either the abilities or the testimony of Liz Isono" in  
11 addressing the qualifications of Markowitz, the qualifications of one service provider have no  
12 bearing on the qualifications of another. Plaintiff is not entitled to his choice of service providers.  
13 See Slama ex rel. Slama v. Indep. Sch. Dist. No. 2580, 259 F. Supp. 2d 880, 885 (D. Minn. 2003)  
14 (holding that the district's refusal to assign the service provider of plaintiff's choice did not  
15 constitute a denial of FAPE). The Act requires only that the service provider be able to meet his  
16 needs. In any case, plaintiff does not cite any specific testimony by Isono that would inform the  
17 determination as to Markowitz's qualifications.

18       Finally, with regard to Patricia Onizuka, the ALJ found that "there was ample testimony by  
19 credible district witnesses who were familiar with her qualifications and experience, and who had  
20 observed her in the classroom" to support the conclusion that Onizuka was well-qualified. Id. at 8 ¶  
21 36. The ALJ noted that Onizuka did not testify herself. Id. The ALJ once again discussed  
22 plaintiff's mother's testimony in a footnote, stating that plaintiff's mother met with Onizuka in what  
23 "appeared to be a formal interview that left Ms. Onizuka in tears." Id. at 9 n.6. The ALJ further  
24 stated that "[i]n spite of the 'interview' conducted by [plaintiff's mother], there was no indication  
25 that Ms. Onizuka was anything other than qualified to assume the role as [plaintiff's] one-to-one  
26 aide when he returned to school." Id. Once again, the ALJ weighed the evidence and determined  
27 that Onizuka was qualified. Significantly, the ALJ specifically cited a credibility determination in  
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1 support of its conclusion regarding Onizuka. Given the fact that the ALJ heard live testimony and  
2 was therefore better equipped to evaluate witness credibility, this court should defer to the ALJ's  
3 findings in this regard. See Amanda J., 267 F.3d at 889 (noting the "general principles of  
4 administrative law which . . . recogniz[e] that a [Hearing Officer] who receives live testimony is in  
5 the best position to determine issues of credibility").

6 In regards to these factual disputes, plaintiff conclusorily alleges that "[t]he ALJ decision  
7 amply demonstrates a clear bias towards the Defendant and against Plaintiff." Apart from the fact  
8 that the ALJ disagreed with plaintiff on these factual issues, there is no evidence of bias. Plaintiff  
9 also objects to the fact that the ALJ made findings regarding these four individuals when they did  
10 not testify at the hearing. Wilock and Markowitz did testify at the hearing, however, and the ALJ's  
11 findings were further based on testimony by others who were familiar with the individuals, and on  
12 other documentary evidence that was appropriate for the ALJ to consider. Further, hearsay is  
13 admissible in administrative proceedings for certain purposes. Cal. Gov. Code § 11513(d).<sup>5</sup>

14 In short, plaintiff has failed to demonstrate that the ALJ's factual determinations regarding  
15 the qualifications of the service providers at issue is entitled to less deference than what is normally  
16 available in IDEA review proceedings.

17  
18 3. Alleged Lack of Required Factual Findings

19 Plaintiff also asserts that the ALJ made no factual findings regarding the appropriateness of  
20 either the proposed classroom placements, the draft behavioral goals or the offered behavioral  
21 support supervision and consultation services for plaintiff's specific needs. Plaintiff further asserts  
22 that the ALJ failed to discuss any specific aspect of the classroom program or the behavioral  
23 component of the IEP programs offered for any of the three periods in question, and that the ALJ  
24 failed to identify any specific evidence to support the claim that the offered classrooms, behavioral  
25 goals and behavior consultation would address plaintiff's specific educational needs. Rather, the  
26 ALJ simply stated that the offers provided FAPE for each time period.

1 The District asserts that the ALJ did make determinations in this regard. The District cites  
2 Findings 19–20, in which the ALJ found that plaintiff’s teacher at Twin Creeks was well-qualified,  
3 and that the teacher followed the goals and objectives dated March 25, 2004 that had been  
4 established for plaintiff. These findings address plaintiff’s placement at Twin Creeks for the  
5 2004–2005 school year only. The ALJ further found that the IEP offered on June 14, 2005 would  
6 adequately address plaintiff’s needs. Decision at 8–9 ¶¶ 33–36. Regarding plaintiff’s behavioral  
7 goals, the ALJ stated, as discussed *supra*, that Markowitz was well-qualified to provide behavioral  
8 services to plaintiff, and that District staff such as Onizuka or Angela Connor were also qualified to  
9 provide behavioral services in the event that an agreement could not be reached regarding PLAY  
10 (owned by Markowitz). Furthermore, the ALJ devoted three specific findings, consisting of three  
11 substantial paragraphs, to plaintiff’s behavioral goals. Decision at 9 ¶¶ 37–39. The ALJ stated that  
12 plaintiff’s goals were discussed beginning at the May 24 IEP meeting. The ALJ found plaintiff’s  
13 behavioral goals were presented and discussed at the June 14 meeting, and that at this meeting  
14 plaintiff’s attorney asserted that the behavioral goals were not appropriate and should be rewritten.  
15 The behavioral goals were revised by Angela Connor subsequent to the meeting and mailed to  
16 plaintiff’s parents.

17 While the ALJ made substantial findings regarding the procedures behind plaintiff’s  
18 behavioral goals, the ALJ does not address the substance of these goals. Rather, the ALJ simply  
19 concluded that “the in home program and behavioral services were reasonably designed to meet  
20 [plaintiff’s] unique needs and to provide him educational benefit, and they comported with the  
21 services he had been receiving.” *Id.* at 15 ¶ 33. The only support that the ALJ offers for its  
22 conclusion that the behavioral goals were appropriate is the assertion that the goals “comported with  
23 the services [plaintiff] had been receiving.” There are no specific findings regarding the substantive  
24 adequacy of the behavioral goals. However, plaintiff does not specifically raise any substantive  
25 objections to the goals. Neither the ALJ nor the parties to this action point to anything in the record  
26 indicating that the behavioral goals developed at the end of the 2004–2005 school year were  
27 appropriate or inappropriate for plaintiff.  
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1 Likewise, the ALJ's decision contains no facts relating to the propriety of the classroom  
2 placements for ESY 2005 and the 2005–2006 school year. The District points to nothing in the  
3 record indicating that the ALJ considered facts related to the classroom placements for these periods.

4 Accordingly, any arguments raised by plaintiff in his motion regarding the substantive  
5 adequacy of plaintiff's classroom placements for ESY 2005 and the 2005–2006 school year, or the  
6 substantive adequacy of plaintiff's behavioral goals, will be reviewed without deference to the  
7 ALJ's non-existent determinations.

8  
9 4. Alleged Failure to Consider Evidence

10 Finally, plaintiff alleges that the ALJ made clearly erroneous factual findings by ignoring  
11 important evidence. Plaintiff asserts that the ALJ ignored documentary evidence showing that  
12 plaintiff's final classroom goals were not offered until the last week of the 2004–2005 school year,  
13 denying appropriate goals for the last three months of that school year. Plaintiff further asserts that  
14 the ALJ ignored evidence showing the District's June draft of behavioral goals was never presented  
15 before the end of the 2004–2005 school year and never discussed at any IEP meeting. Plaintiff also  
16 alleges that the ALJ ignored the evidence showing that the June 14 IEP offer omitted necessary  
17 behavioral support supervision and consultation for the extended school year classroom, and ignored  
18 evidence showing the IEP never discussed the appropriateness of the classroom placement offered  
19 by the District for 2005–2006. Plaintiff characterizes these omissions as missing program  
20 components, and components offered without parental or teacher participation. Defendants do not  
21 meaningfully respond to these arguments, nor do they point to any portion in the ALJ's decision  
22 addressing these issues.

23 Accordingly, any arguments raised by plaintiff in his motion regarding these issues will be  
24 reviewed without deference to the ALJ's unsupported determinations.

1           B.     Legal Challenges

2           In addition to his challenges to the ALJ's factual findings, plaintiff challenges several of the  
3 ALJ's conclusions of law as either not supported by existing law or directly contrary to established  
4 law. The court will consider each challenged conclusion in turn.

5  
6                     1.     Conclusion of Law No. 10

7           The ALJ concluded that the District complied with the required IDEA procedures because  
8 the District's "conduct was reasonably calculated to gain the maximum input from the proper parties  
9 into developing a correct IEP." Plaintiff asserts that this finding is irrelevant and fails to comport  
10 with the holdings in Shapiro ex rel. Shapiro v. Paradise Valley Unified Sch. Dist., 317 F.3d 1072  
11 (9th Cir. 2003), superseded by statute on other grounds, or W.G. v. Bd. of Target Range Sch. Dist.,  
12 960 F.2d 1479 (9th Cir. 1992) (hereinafter "Target Range").

13           In Shapiro, 317 F.3d at 1077, the district scheduled an IEP meeting that the parents were  
14 unable to attend due to scheduling conflicts. The court held that "before [a district] can hold an IEP  
15 meeting without a child's parents, the school district must document phone calls, correspondence,  
16 and visits to the parents demonstrating attempts to reach a mutually agreed upon place and time for  
17 the meeting." Id. at 1078. The court held that the district had not satisfied the procedural  
18 requirements because "the Shapiros asked to reschedule the June 8 meeting; they did not refuse to  
19 attend." Id.

20           Likewise, the court in Target Range, 960 F.2d at 1484, held that the school did not comply  
21 with the required IDEA procedures where the district "independently developed an IEP . . . without  
22 the input and participation of" the child's parents or teacher, and "did not attempt to reconvene the  
23 meeting in order to include the required participants." The IDEA therefore requires specific efforts  
24 to include the child's parents and teachers in the development of the IEP. Conduct "reasonably  
25 calculated to gain the maximum input from the proper parties" is not sufficient. The ALJ therefore  
26 applied the wrong standard in determining that the district complied with the procedural  
27 requirements of the IDEA with respect to the 2004–2005 school year.



1                   2.       Conclusion of Law No. 12

2           The ALJ concluded that “[f]rom March 2005 to the end of the school year, a full educational  
3 plan was in place to provide [plaintiff] with a FAPE. The District did not violate their procedural  
4 responsibilities in formulating and implementing the IEP for the 2004–2005 school year.” Plaintiff  
5 asserts that the ALJ relied on the “stay put” nature of the November IEP to reach this conclusion, but  
6 that the ALJ cited no legal authority supporting the conclusion that a “stay put” provision  
7 necessarily provides FAPE when a new IEP has not been developed because of disagreement  
8 between the parties. Plaintiff disputes that this legal theory is correct.

9           To begin with, it is not clear from the record that the November IEP actually “expired” in  
10 March 2005. If it did not, the ALJ would not have had to rely on this theory in finding that a full  
11 IEP was in place through the end of the school year. Even if the November IEP did expire, however,  
12 the ALJ was not necessarily incorrect in reaching its conclusion. While an expired “stay put” IEP  
13 does not necessarily provide FAPE, keeping an expired IEP in place does not necessarily constitute  
14 a denial of FAPE. See School for the Arts in Learning (SAIL) Pub. Charter Sch. v. Johnson, No.  
15 02-1722 (RMC), 2006 WL 1000337, at \*5–\*6 (D.D.C. Apr. 13, 2006) (holding that keeping an  
16 “expired” IEP in place pending the development of a new IEP provided FAPE). The ALJ’s legal  
17 analysis in this regard was therefore not erroneous.

18  
19                   3.       Conclusions of Law No. 24 & 26–29

20           Plaintiff’s main challenge to the ALJ’s conclusions of law relate to the ALJ’s ultimate  
21 determination that the District satisfied the procedural requirements of the IDEA for ESY 2005 and  
22 the 2005–2006 school year. Plaintiff raises specific challenges to several of the individual  
23 conclusions supporting this determination.

24           In Conclusion of Law No. 24, the ALJ concluded that “[w]hile the District had an obligation  
25 to present a complete IEP, based upon the discussions that occurred at those meetings [in April, May  
26 and June 2005], the District was acting diligently in getting the necessary information to put together  
27 a complete IEP” for ESY 2005 and the 2005–2006 school year. Plaintiff asserts that this finding is  
28



1 irrelevant to the issue of FAPE, and that the ALJ cited no authority supporting a “diligence  
2 exception” to the IDEA’s procedural requirements.

3 In Conclusion of Law No. 26, the ALJ concluded as follows:

4 The parents were present, actively participating, had the benefit of  
5 counsel at the [April, May and June 2005] meetings, and had the  
6 insights from trusted, long term service providers present for input.  
7 The parents had the opportunity to discuss and give input on the goals  
8 and objectives, specifically the behavioral goals, which were discussed  
9 at the June 14 IEP meeting, and it was the parents’ attorney who  
10 indicated that the behavioral goals were not appropriate and needed to  
11 be rewritten. The District did so in an expeditious manner, and mailed  
12 the goals to the parents. The June 14 meeting including [sic]  
13 discussions about in home services and educational placement, and it  
14 was well known what was contemplated for ESY 2005 and the  
15 2005–2006 school year.

16 Plaintiff asserts that this discussion amounts to a conclusion that the District satisfied the  
17 Act’s procedural requirements by including the parents in the IEP meetings despite the fact that the  
18 District submitted revised behavioral goals to the parents after the June 14 IEP meeting. Plaintiff  
19 further claims that Conclusions of Law Nos. 27–29<sup>6</sup> acknowledge “Defendant’s omissions,  
20 procedural violations, and the resulting technically flawed IEP offer for the 2005–2006 school year,”  
21 but that the ALJ improperly excused these violations. Plaintiff asserts that the ALJ misunderstands  
22 the holding in Union Sch. Dist. v. Smith, 15 F.3d 1519 (9th Cir. 1994) and the line of cases  
23 following it.

24 In Union, 15 F.3d at 1525, the court considered whether the District was required to make a  
25 formal written offer for a placement that a child’s parents had expressed unwillingness to consider.  
26 The court held that, given the importance of the IDEA’s procedural requirements, “a school district  
27 cannot escape its obligation under the IDEA to offer formally an appropriate educational placement  
28 by arguing that a disabled child’s parents expressed unwillingness to accept that placement.” Id. at  
1526. Emphasizing the importance of the formal offer requirement, the court continued:

We find that this formal requirement has an important purpose that is  
not merely technical, and we therefore believe it should be enforced  
rigorously. The requirement of a formal, written offer creates a clear  
record that will do much to eliminate troublesome factual disputes  
many years later about when placements were offered, what  
placements were offered, and what additional educational assistance  
was offered to supplement a placement, if any. Furthermore, a formal,

specific offer from a school district will greatly assist parents in presenting complaints with respect to any matter relating to the educational placement of the child.

Id. (internal quotations omitted).

The ALJ cited Union in its conclusions of law and determined that plaintiff's parents were well-informed and that the written IEP offers were clear. This is not a case such as Union where the district utterly failed to make any formal offer whatsoever. Rather, the District in this case provided numerous written offers to plaintiff's parents as the District worked with plaintiff's parents to develop plaintiff's IEP. Furthermore, the revisions that the District made after the June 14 meeting were made at the request of plaintiff's attorney. The fact that plaintiff's parents were not involved in further formulation of the IEP for ESY 2005 and the 2005–2006 school year appears to be the result of plaintiff's parents conscious decision to stop cooperating with the District beginning in June 2005. The District made several attempts to schedule additional meetings after June 24. Admin Rec. at 262, 273–74. The District then attempted to convene a meeting in September 2005, but the meeting ended when plaintiff's parents left the meeting. September 28, 2005 Transcript at 79:2–80:2. The District should not be held accountable for plaintiff's parents' lack of cooperation. In sum, the District made every effort to include plaintiff's parents in the formulation of the June IEP. Based on this record, the ALJ concluded that the pertinent procedural requirements were met. The ALJ's application of Union to these facts did not constitute erroneous legal analysis.

#### 4. Prior Written Notice of IEP Offers

Finally, plaintiff asserts that the ALJ failed to acknowledge or address the fact that the District failed to satisfy the procedural requirement of sending “prior written notice” regarding any element of any of its three IEP offers except the two such notices it sent denying plaintiff's parents' request for Stepping Stones. The District has not responded to this argument in the context of defending the ALJ's decision. Accordingly, the question of whether the District provided “prior written notice” regarding the three IEP offers will be considered without deference to the ALJ's determination.

1 II. Denial of FAPE

2 Plaintiff's motion raises several direct arguments regarding the District's alleged failure to  
3 provide FAPE as required by the IDEA. Plaintiff alleges that, with respect to each of the three time  
4 periods in question, the District denied plaintiff his right to (1) parent participation in the  
5 development of his IEP, (2) the participation of his special education teacher in the development of  
6 his IEP, (3) the receipt of a clear, written IEP offer, (4) the receipt of an offer of program, placement  
7 and services that addressed each of his identified needs, and (5) the receipt of prior written notice of  
8 proposed changes to his IEP. Plaintiff also asserts that the District's failure to convene an IEP  
9 meeting until after March 24, 2005 constituted a denial of FAPE. With the exception of the  
10 allegation that the District's offers did not address plaintiff's individual needs, plaintiff's claims  
11 allege procedural violations of the IDEA.

12  
13 A. The Timing of the IEP Meetings

14 Plaintiff asserts that the District violated the procedural requirements of the IDEA by failing  
15 to convene an IEP meeting prior to March 24, 2005, the date specified on the November IEP.  
16 Regarding this issue, the District appears to assert that the November IEP was to remain in effect  
17 throughout the 2005–2006 school year subject to the development of a transition plan from SI to  
18 another provider. The District claims to have developed a suitable transition plan as of January 28,  
19 at which point they informed plaintiff's parents that PLAY was prepared to begin assuming  
20 behavioral supervision services and that a district staffmember was prepared to take over plaintiff's  
21 paraeducator responsibilities. The District therefore claims that an adequate IEP was in force  
22 throughout the 2004–2005 school year.

23 The ALJ's determination on this point, as characterized by plaintiff, adopts the District's  
24 position that the classroom placement and services provided for in the November IEP remained in  
25 place and appropriate through the end of the school year.

26 The parties are at odds regarding the significance of the March 24 date on the November  
27 IEP. Plaintiff interprets the date as the date upon which the November IEP expired, and that  
28

1 therefore the district was required to develop a new IEP prior to that date. The District claims that  
2 March 24 was the “annual review date,” meaning the date on which the IEP team was supposed to  
3 meet in order to develop IEPs for the 2005 ESY and 2005–2006 school year. The District therefore  
4 claims that the November IEP did not “expire” until the end of the 2004–2005 school year.

5 The document on its face is ambiguous as to the meaning of the March 24 date. See Admin.  
6 Rec. at 16. The date appears in the upper right-hand corner of the first page, in a box with several  
7 check-boxes. The check-boxes are labeled “New referral,” “Annual,” “Triennial,” “Transition” and  
8 “Review.” Below these boxes are the words “Next review:” followed by a blank line. The  
9 “Review” box is checked, and “3–24–05” is handwritten on the line next to “Next review:”. Thus,  
10 March 24, 2005 was clearly a “review date” of some sort. However, the November IEP itself is  
11 marked as a “Review,” and therefore the date could indicate that another such document was to be  
12 prepared on March 24, 2005. Fortunately the court need not resolve this ambiguity. The ALJ sided  
13 with the District’s interpretation, and this court will defer to the ALJ’s specialized knowledge in this  
14 regard. Amanda J., 267 F.3d at 888. In other words, plaintiff has not satisfied his burden of proof in  
15 showing that the ALJ’s findings should be disturbed.

16 Furthermore, even if the November IEP in fact expired on March 24, other factors weigh  
17 against finding for the plaintiff. The District did convene a meeting shortly after the alleged  
18 “expiration” date, on April 5, 2005. Furthermore, plaintiff’s parents had taken him out of school as  
19 of February, and it is therefore unclear what benefit plaintiff would have received had the District  
20 been compelled to meet on or before March 24, 2005. The District’s conduct with respect to the  
21 timing of the IEP meetings therefore did not “result in the loss of educational opportunity,”  
22 “seriously infringe the parents’ opportunity to participate in the IEP formulation process,” or  
23 “caus[e] a deprivation of educational benefits.” Amanda J., 267 F.3d at 892. In sum, plaintiff has  
24 failed to demonstrate an actionable procedural violation with respect to the alleged lack of an  
25 effective IEP during the latter portion of the 2004–2005 school year.

1           B.     Participation of Required Individuals in IEP Meetings

2           The main thrust of plaintiff's procedural argument is that the District deprived plaintiff of the  
3 participation of his parents and special education teacher in the development of the IEP by revising  
4 the June 14 IEP after the June 14 meeting. Because these revisions were made without consulting  
5 plaintiff's parents or special education teacher, plaintiff argues, the District violated the procedural  
6 provisions of the IDEA. The District asserts that plaintiff's parents attended and actively  
7 participated in the three meetings held between April 5, 2005 and June 14, 2005. This is supported  
8 by the record, and plaintiff does not appear to dispute that plaintiff's parents attended the formal IEP  
9 meetings that took place during this period. As to the participation of plaintiff's special education  
10 teacher, the District asserts that plaintiff's District special education teacher, Mr. Douglas, was  
11 present at every IEP meeting, and that Stepping Stones representatives were present at each IEP  
12 meeting beginning in April. However, neither these special education teachers nor plaintiff's  
13 parents participated in writing the revisions to the June 14 IEP that the District presented to  
14 plaintiff's parents after that meeting.

15           The issue, therefore, is whether the revisions to the IEP by Angela Connor without direct  
16 participation by plaintiff's parents and special education teachers violated the procedural  
17 requirements of the IDEA.

18           The District asserts that the revisions proposed on June 24 were made by Connor at the  
19 request of plaintiff's attorney. This assertion is supported by the record.<sup>7</sup> The June 24 letter  
20 purports to provide "a description of the District's complete proposed offer for Summer 2005 and  
21 the 2005–06 school year," and further states: "We are happy to discuss this proposal to get your  
22 input, at the next IEP meeting, which we are trying to schedule." Admin Rec. at 262. The District  
23 asserts that it convened an IEP meeting in September 2005 in order to seek plaintiff's parents input,  
24 but that the meeting was stopped when the parents walked out of the meeting.

25           Courts have placed great importance on parental involvement in the development of IEPs.  
26 See Shapiro, 317 F.3d at 1077 ("The importance of parental participation in the IEP process is  
27 evident."); Amanda J., 237 F.3d at 892 ("Procedural violations that interfere with parental  
28

1 participation in the IEP formulation process undermine the very essence of the IDEA.”). In an oft-  
2 quoted passage from Rowley, 458 U.S. at 205–206, the Supreme Court stated:

3           It seems to us no exaggeration to say that Congress placed every bit as  
4           much emphasis upon compliance with procedures giving parents and  
5           guardians a large measure of participation at every stage of the  
6           administrative process . . . as it did upon the measurement of the  
7           resulting IEP against a substantive standard.

8           In Shapiro, 317 F.3d at 1077, the district failed to include the child’s parents in an IEP  
9 meeting. The district contended that, despite their absence at the meeting, the parents “contributed  
10 adequately to the . . . IEP because the [district] mailed the IEP to them for their approval and they  
11 participated in the prior IEP meetings.” Id. at 1078. The court held that such “[a]fter-the-fact  
12 parental involvement is not enough,” and that parents must be involved in the IEP “creation  
13 process.” Id.

14           In Target Range, 960 F.2d at 1484, the district independently developed the IEP without the  
15 input and participation of the child’s parents or teacher, and failed to make efforts to include these  
16 required individuals. The court held that this was a procedural violation of the IDEA. Id. at 1485.

17           Here, it is apparent that plaintiff’s parents and teachers were actively involved in the creation  
18 of the June 2005 IEP. The revisions made to the June 14 IEP were not the result of a separate IEP  
19 meeting from which plaintiff’s parents and teachers were excluded as in Shapiro, or a wholly  
20 independent internal process as in Target Range. Rather, the revisions were made by Connor at the  
21 request of plaintiff’s attorney. Furthermore, even after plaintiff’s parents and teachers participated  
22 and provided input during the June 14 meeting, plaintiff’s parents were offered additional  
23 opportunities to provide input via the June 24 letter. While it is troubling that the District’s  
24 “complete proposed offer” contained a glaring omission<sup>8</sup> and was sent four days before the  
25 beginning of ESY 2005, the record shows that the full IEP team had been working consistently since  
26 early April in order to develop the IEP. The timing of the offer left little room for further input  
27 regarding the proposed IEP for ESY 2005. However, given the substantial previous input from  
28 plaintiff’s parents and teachers and the inability of the team—including plaintiff’s parents—to  
decide on an IEP prior to that time, it is evident that the District did not deny plaintiff the

1 opportunity for his parents and teachers to participate in the formulation of his IEP for ESY 2005  
2 and the 2005–2006 school year.

3  
4 C. Prior Written Notice

5 As an additional procedural challenge, plaintiff asserts that the District failed to “provide  
6 ‘prior written notice’ regarding any element of its three IEP offers except the two such notices it sent  
7 denying parents’ request for Stepping Stones.” It is not clear precisely what plaintiff is seeking with  
8 this argument, as plaintiff does not identify any changes or rejections that he claims required prior  
9 written notice. Absent a clear argument as to what the plaintiff seeks, the court finds no evidence  
10 that the District failed to comply with the Act’s prior written notice requirements.

11  
12 D. Formal Written Offers

13 As a final procedural complaint, plaintiff alleges that the District failed to issue a formal  
14 written offer to plaintiff as required by Union. As discussed above, plaintiff asserts that no offer  
15 whatsoever was made to cover the period between March 25 through April 4, 2005. Plaintiff further  
16 alleges that the purported offers made beginning April 5 did not satisfy the formal requirements of  
17 the IDEA. Plaintiff asserts that the June 14 offer did not specify a classroom for the 2005–2006  
18 school year or behavioral services for ESY 2005 or 2005–2006, though plaintiff acknowledges that  
19 the June 24 and 27 letters specified classroom placements for both periods. Plaintiff further asserts  
20 that the letters dated in late June did not specify behavioral services for home programs for the 2005  
21 ESY or 2005–2006 year, though plaintiff acknowledges that such home programs were included in  
22 the June 14 IEP offer. Finally, plaintiff asserts, without citation to authority, that the differing  
23 versions of the same offer embodied in the June 14 IEP and the June 24 and 27 letters “evinces the  
24 kind of procedural violation that can only be considered absolutely fatal to any offer.”

25 The District claims that the offers it provided to plaintiff’s parents in the letters dated June 24  
26 and June 27, 2005, taken together with the formal written offer provided at the June 14 IEP meeting,  
27 constituted a formal offer in compliance with the IDEA.<sup>9</sup> The District asserts that plaintiff’s mother  
28



1 testified that she understood the District had offered a home program. The District's  
2 characterization of the requirement in Union is that the formal written offer must "place the parents  
3 on notice that they must decide whether the offer would be appropriate under the IDEA." Def. Opp.  
4 at 11.

5 The formality requirements set forth in Union go beyond the notice function suggested by the  
6 District. In addition to advising the parents as to whether a due process action is necessary, the  
7 formal written offer requirement "creates a clear record that will do much to eliminate troublesome  
8 factual disputes many years later about when placements were offered, what placements were  
9 offered, and what additional educational assistance was offered to supplement a placement, if any."  
10 Union, 15 F.3d at 1526. No such factual record or notice existed in Union because there was no  
11 written notice provided whatsoever. Here, by contrast, the District provided three separate written  
12 offers, creating a factual record of what was being offered by the District. Plaintiff's parents had  
13 been directly involved in the formal IEP meetings and were aware of the services being offered.  
14 Plaintiff does not assert that his parents were confused by the "different versions" of the June offer,  
15 on that the offers were not sufficiently formal. The court therefore finds that the District complied  
16 with the written offer requirements of the IDEA.

17  
18 E. Substantive Violations

19 Plaintiffs allege that the District substantively denied plaintiff FAPE by failing to provide an  
20 offer of program, placement and services that addressed each of his identified needs. Specifically,  
21 plaintiff points to the written documentation provided by the District and the notes of the various  
22 IEP meetings and claims that both sets of documents omit discussions of necessary elements of  
23 plaintiff's IEP. Specifically, the issue is whether the IEP was "reasonably calculated to enable the  
24 child to receive educational benefits." Rowley, 458 U.S. at 206.

25 Plaintiff alleges that the District did not offer any written classroom/academic goals and  
26 objectives for the 2004–2005 school year until June 14, 2005, thereby substantively denying him  
27 FAPE for the portion of the 2004–2005 school year after the expiration of the November IEP.  
28



1 Plaintiff further alleges that, while plaintiff's academic goals were discussed and revised beginning  
2 with the April 5, 2005 IEP meeting, the District failed to offer revised behavioral goals for the  
3 period from March 25 to the end of the 2004–2005 school year. Likewise, plaintiff alleges that the  
4 District failed to offer AAC goals (which were written to extend to February 2005), occupation  
5 therapy goals and services and speech/language goals and services (both of which were written to  
6 extend to March 2005) until April 5.

7 As discussed above, it is not at all clear that the November IEP actually expired in March  
8 2005. In any case, the District was prepared to keep the November IEP in place through to the end  
9 of the 2004–2005 school year, and plaintiff has identified no substantive deficiencies in the  
10 November IEP that would have rendered the plan inappropriate for those remaining months.  
11 Plaintiff has therefore failed to demonstrate a substantive denial of FAPE for the 2004–2005 school  
12 year.

13  
14 F. Summary

15 The court is not persuaded that the IEPs that were developed for the periods of time in  
16 question were legally insufficient. The District had the necessary competence and personnel, and  
17 was able to conform to the IEPs sufficiently to meet the needs of plaintiff. The court reaches this  
18 conclusion regardless of the level of deference afforded to the ALJ. Many of the ALJ's conclusions  
19 were adequately supported by his own factual findings. Although the ALJ's decision contains some  
20 gaps, the record as a whole supports the conclusions of the ALJ.

21  
22 III. Attorneys' Fees and Costs

23 Because plaintiff has not established that he is the prevailing party in this action or the  
24 underlying due process action, plaintiff is not entitled to attorneys' fees or costs.  
25  
26  
27  
28

1 CONCLUSION

2 For the foregoing reasons, the court DENIES plaintiff's motion for summary judgment.  
3 Because plaintiff bears the burden of showing that the ALJ's decision should be overturned, and  
4 plaintiff has failed to meet his burden, the court GRANTS defendant's motion for summary  
5 judgment.

6  
7 IT IS SO ORDERED.

8  
9 Dated: January 25, 2007



MARILYN HALL PATEL  
United States District Court Judge  
Northern District of California

**ENDNOTES**

1. Unless otherwise specified, the facts are taken from the parties' Joint Statement of Undisputed Facts.
2. The parties dispute whether this IEP provided for services until March 24, 2005 only or through the end of the 2004–2005 school year.
3. See Administrative Record (hereinafter "Admin. Rec.") at 257–261.
4. See Admin. Rec. at 262.
5. California Government Code Section 11513(d) provides:

Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. An objection is timely if made before submission of the case or on reconsideration.

6. Conclusion of Law 27 states:

In a letter from the District to the parents dated June 24, the District indicated that they would discuss the goals, wanted the parent's input, and were trying to schedule a further IEP meeting. The parents did not respond to that request. The District admits that it omitted the home portion of the offer. However, all parties knew that in home support was always contemplated as part of the plan and through District inadvertence, it was omitted from the final written offer sent to the parents. Similarly, PLAY had been offered as the provider, but when the parents would not consider PLAY, the District changed to a District behavior analyst as the service provider. Both were well known and discussed at the meetings. Neither the parents nor the parents' attorney called or otherwise attempted to find out why these were omitted, which seems illogical in light of the extensive discussions input, history and extensive communication that had been going on in this case.

- Conclusion of Law No. 28 states:

It was a procedural error for the District to omit portions from the final offer in the letter, but it was not the type of error given the circumstances in this case that impeded [plaintiff's] right to a FAPE, significantly impeded the parent's [sic] opportunity to participate in the decision making process regarding the provision of a FAPE to the

1 parents' child, or cause a deprivation of educational benefits. (20  
2 U.S.C. §1415(f)(3)(E).)

3 Conclusion of Law No. 29 states:

4 The District must not prevent the parents from participating  
5 meaningfully in the IEP process. (*W.G. v. Bd. Of Trustees of Target*  
6 *Range School District No. 23, supra*, 960 F.2d at 1483.) Further, the  
7 District is required to make a formal offer of FAPE to the student in  
8 writing, even though the parents have indicated they will not accept  
9 the offer. (*Union School District v. B. Smith* (9th Cir. 1994) 15 F.3d  
10 1519, 1525–1526.) The facts of this case indicate that the District  
11 facilitated the parent's [sic] participation in the IEP process, and made  
12 a clear offer of placement. The District sent multiple emails and  
13 letters to the parents urging their input into the transition offer for  
14 [plaintiff]. Furthermore, the offer, while technically flawed, reflected  
the multiple communications and discussions that had occurred  
involving the District, the parents, and the parents' attorney for over a  
year about establishing a transition for [plaintiff] and returning him to  
the educational setting. The District's actions more than complied  
with the law and any delays or minor errors do not rise to the level of  
the violations that occurred in the cases cited above.

15 7. The June 14 IEP comments section states that "Attorney for the district indicated she believes the  
16 goals need to be rewritten, indicating they are inappropriate." Admin. Rec. at 224. Plaintiff's  
17 mother testified that the identification of the objecting attorney as the District's attorney is an error,  
18 and that it was plaintiff's attorney who indicated that the goals needed to be rewritten. Oct. 3, 2005  
Transcript at 222:15–223:6.

19 8. As explained below, the June 24 and 27 letters inadvertently omitted plaintiff's home program in  
20 the description of the offers for ESY 2005 and the 2005–2006 school year.

21 9. The District asserts that plaintiff's mother testified that she understood that the District had  
22 offered a home program. However, plaintiff's mother's testimony states only that she understood a  
23 home program to have been offered in the June 14 IEP. Oct. 3, 2005 Transcript at 228:15–25.  
24 Plaintiff's mother never testified that she understood the June 24 and 27 letters to have offered home  
programs. This does, however, support the finding that plaintiff's parents were aware that a home  
program had been developed and offered by the District prior to the June 24 and 27 letters.